Dominic Chin Joon Siong v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-09–26 OF 2001
LOW HOP BING, ZAINUN ALI AND HASAN LAH JJCA
28 JANUARY 2008

Constitutional Law — Parliament — Legislative powers — Legislative competence of Parliament, extent of — Whether Parliament may enact written laws to replace, displace or overrule common law rules

Criminal Law — Aviation Offences Act 1984 — s 9(2) — Destroying, damaging or endangering safety of aircraft — Sentence, adequacy of — Whether 10 years' imprisonment manifestly excessive — Whether such sentence reflected seriousness and gravity of offence

Criminal Procedure — Sentence — Adequacy of sentence — Destroying, damaging or endangering safety of aircraft — Whether 10 years' imprisonment manifestly excessive — Whether sentence reflected seriousness and gravity of offence — Whether appellate interference warranted — Aviation Offences Act 1984 s 9(2)

Evidence — Affidavit — Admissibility of — Provision as to evidence in connection with aircraft — Witnesses not in Malaysia — Whether court may admit depositions or affidavits affirmed by such witnesses — Whether court may dispense with cross-examination of such witnesses — Aviation Offences Act 1984 s 6(1)(b)

Evidence — Burden of proof — Criminal case — General common law rule casting burden of proof upon prosecution throughout criminal proceedings — Whether such rule may be replaced, shifted or overruled by statutory provisions enacted by Parliament

Evidence — Burden of proof — Shifting of — Whether Parliament competent to shift burden of proof over to accused through enactment of statutory provisions

The accused was ostensibly upset with a young female student studying in

A New Zealand. This student had not only spurned his overt romantic advances, but had also complained to his fiancée, resulting in the break up of his engagement. The accused sent the student a parcel, containing an improvised explosive device ('IED'). The parcel was sent through air, processed and received by the New Zealand postal authorities who notified B the student. She picked the parcel up from the Wellington post office and as she was unwrapping the parcel, the IED exploded injuring the student and a friend who had accompanied her. The accused was subsequently apprehended and tried in the sessions' court on a charge under s 9(2) of the Aviation Offences Act 1984 ('the Act') for, inter alia, causing to be placed on C an aircraft a device likely to endanger its safety in flight. At the trial, the prosecution admitted affidavits of six witnesses who resided in New Zealand, pursuant to s 6 of the Act. The accused was eventually convicted and sentenced to 10 years' imprisonment. His appeal against conviction and sentence was dismissed by the High Court, and he thus appealed to the Court D of Appeal. The sole issue pursued in the Court of Appeal concerned the admissibility of the affidavits. Counsel for the accused contended that Parliament, in enacting s 6 of the Act, had been under a misconception that the 'prima facie' standard of proof was required at the close of the prosecution's case when in fact it was the 'beyond reasonable doubt' standard E of proof. Counsel further argued that since the affidavits were inadmissible, there was a break in the chain of evidence.

F **Held**, dismissing the appeal and affirming the conviction and sentence:

(1) In the instant case, the sessions' court had embarked upon a maximum evaluation of the evidence at the close of the prosecution's case, before calling upon the accused to enter his defence. The sessions' court had applied the correct standard of proof — beyond reasonable doubt — G as the standard prevailing then (see para 44).

(2) There was ample unchallenged evidence of an unbroken link in the handling of the parcel from the time it was received as a mail parcel in Kuching to the time of its explosion in the hand's of the student in Wellington. The defence was correctly called (see para 45). H

(3) Section 6(1)(b) of the Act specifically reflects the intention of Parliament to dispense with the attendance of relevant witnesses for cross-examination. It was designed to cover the category of witnesses who cannot be found in Malaysia. Its purpose is to avoid the expense I and inconvenience of procuring their presence to testify in person, or to obviate the obstacle of compelling their presence when they are unwilling to present themselves as witnesses on the ground of extra territorial jurisdiction. It empowers the court hearing the charge against the accused to receive the affidavits as admissible evidence, so long as

the affidavits have fulfilled the requirements therein. In the instant appeal, the statutory requirements had been fulfilled (see para 59).

(4) On the facts, there was no question of Parliament being under a misconception relating to the common law standard of proof. The legislative competence of Parliament meant that Parliament, through the provisions of s 6(1), was entitled to replace the common law standard of proof. The High Court had correctly interpreted and applied s 6(1) and made no error in affirming the decision of the sessions court (see paras 62 & 64).

(5) In the circumstances, given that the maximum sentence prescribed by Parliament for the offence was life imprisonment, 10 years' imprisonment as imposed by the sessions' court and affirmed by the High Court could hardly be construed as manifestly excessive. The sentence was not an erroneous exercise of discretion and was commensurate with the seriousness and gravity of the offence. In the absence of any unauthorised, extraneous or irrelevant exercise of discretion by the courts below, the Court of Appeal should be slow and indeed should refrain from disturbing the sentence (see paras 72–73).

[Bahasa Malaysia summary

Tertuduh kononnya sakit hati dengan seorang wanita muda yang belajar di New Zealand. Pelajar ini bukan sahaja telah menolak dengan angkuh cubaan beliau untuk memikatnya, tetapi telah mengadu juga kepada tunang beliau, yang menyebabkan terputusnya pertunangan beliau. Tertuduh telah menghantar kepada pelajar tersebut sebuah bungkusan, yang mengandungi alat letupan yang telah diimprovisasi ('ALD'). Bungkusan tersebut telah dihantar melalui udara, diproses dan diterima oleh wakil pos New Zealand yang telah memaklumkan kepada pelajar tersebut. Beliau telah mengambil bungkusan itu daripada pejabat pos Wellington dan semasa beliau membuka bungkusan itu, ALD itu telah meletup dan mencederakan pelajar dan rakan yang bersamanya. Tertuduh kemudian telah ditahan dan dibicarakan di mahkamah sesyen atas pertuduhan di bawah s 9(2) Akta Kesalahan-Kesalahan Penerbangan 1984 ('Akta tersebut') untuk, antara lain, menyebabkan terletaknya dalam pesawat udara apa-apa peranti yang mungkin membahayakan keselamatannya dalam penerbangan. Semasa perbicaraan, pihak pendakwaan telah memasukkan afidavit-afidavit enam saksinya yang menetap di New Zealand, menurut s 6 Akta tersebut. Tertuduh akhirnya telah disabitkan dan dijatuhkan hukuman 10 tahun penjara. Rayuan beliau terhadap sabitan dan hukuman telah ditolak oleh Mahkamah Tinggi, dan oleh itu beliau merayu ke Mahkamah Rayuan. Satu-satunya isu yang dibangkitkan di Mahkamah Rayuan adalah berkaitan dengan kebolehterimaan afidavit-afidavit tersebut. Peguam tertuduh

berhujah bahawa Parlimen, dalam menggubal s 6 Akta tersebut, telah salah tanggap bahawa piawai bukti 'prima facie' diperlukan di akhir kes pihak pendakwaan walhal ianya piawai bukti 'melampaui keraguan munasabah'. Peguam seterusnya berhujah bahawa memandangkan afidavit-afidavit tersebut tidak boleh diterima, rangkaian keterangan telah terputus.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Dalam kes ini, mahkamah sesyen telah memulakan penilaian maksimum ke atas keterangan di akhir kes pihak pendakwaan, sebelum memanggil tertuduh untuk memasukkan pembelaan beliau. Mahkamah sesyen telah menggunakan piawai bukti yang betul — melampaui keraguan munasabah — yang merupakan piawai yang lazim ketika itu (lihat perenggan 44).

(2) Terdapat keterangan yang tidak dicabar yang memadai dalam rangkaian yang tidak terputus dalam pengendalian bungkusan itu dari masa ia diterima sebagai bungkusan mel di Kuching hingga masa ia meletup dalam tangan pelajar di Wellington. Pembelaan telah dipanggil dengan betul (lihat perenggan 45).

(3) Seksyen 6(1)(b) Akta tersebut secara khususnya menggambarkan niat Parlimen untuk mengecualikan kehadiran saksi-saksi relevan untuk pemeriksaan balas. Ia digubal untuk merangkumi kategori saksi-saksi yang tidak boleh dijumpai di Malaysia. Tujuannya adalah untuk mengelakkan perbelanjaan dan kesulitan dalam memastikan kehadiran mereka untuk memberikan keterangan secara individu, atau mengelakkan halangan dalam mendesak kehadiran mereka apabila mereka tidak ingin menghadirkan diri sebagai saksi-saksi atas alasan bidang kuasa luar wilayah. Ia memberikan kuasa kepada mahkamah yang membicarakan pertuduhan terhadap tertuduh untuk menerima afidavit-afidavit sebagai keterangan yang boleh diterima, asalkan afidavit-afidavit tersebut memenuhi keperluan yang ditetapkan. Dalam rayuan ini, keperluan statutori telahpun dipenuhi (lihat perenggan 59).

(4) Di atas fakta, tiada persoalan tentang Parlimen mempunyai tanggapan salah berkaitan piawai bukti *common law*. Kompetens perundangan Parlimen bermaksud bahawa Parlimen, melalui peruntukan s 6(1), berhak menggantikan piawai bukti *common law*. Mahkamah Tinggi dengan betul telah mentafsirkan dan menggunakan s 6(1) dan tidak membuat apa-apa kesilapan dalam mengesahkan keputusan mahkamah sesyen (lihat perenggan 62 & 64).

(5) Dalam keadaan ini, memandangkan hukuman maksimum yang ditetapkan oleh Parlimen untuk kesalahan tersebut adalah penjara seumur hidup, penjara 10 tahun sepertimana yang dikenakan oleh

mahkamah sesyen dan disahkan oleh Mahkamah Tinggi tidak boleh ditafsirkan sebagai melampau. Hukuman itu bukan satu pelaksanaan budi bicara yang salah dan setara dengan keseriusan dan graviti kesalahan. Dalam ketiadaan pelaksanaan budi bicara tanpa kuasa, melampau atau tidak relevan oleh mahkamah bawahan, Mahkamah Rayuan patut melengahkan dan sepatutnya mengelak daripada mengganggu hukuman tersebut (lihat perenggan 72–73).]

Notes

For cases on adequacy of sentence, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3290–3323.

For cases on admissibility of affidavit, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 235–240.

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3342–3392.

For cases on burden of proof of criminal case, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 391–406.

For cases on legislative powers generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2255–2259.

For cases on s 9(2) of the Aviation Offences Act 1984 generally, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1–3047.

For cases on shifting of burden of proof, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 578–587.

Cases referred to

A Ragunathan v Pendakwa Raya [1982] 1 MLJ 139 (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Bahruni bin Ismail v Pendakwa Raya [1997] 2 MLJ 265 (refd)
Bhandulananda Jayatilake v PP [1982] MLJ 83 (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1 (refd)
Datuk Sahar bin Arpan v PP [2007] 1 MLJ 697 (refd)
Haw Tua Tau v PP [1981] 2 MLJ 49 (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265 (refd)
Loh Liang Gun & Anor v PP [2007] 5 MLJ 159 (refd)

Legislation referred to

Anti Corruption Act 1997 s 42
Aviation Offences Act 1984 ss 6, 6(1), 6(1)(a), 6(1)(b), 6(5)(a), 6(5)(b), 9(2), 14
Customs Act 1967 s 119
Dangerous Drugs Act 1952 s 37

Appeal from: Criminal Appeal No 42–02 of 1999–II (High Court, Kuching)

Karpal Singh (Anthony Bong with him) (Karpal Singh & Co) for the appellant.
Manoj Kurup (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

INTRODUCTION

[1] On 14 November 1998 in Kuching, the learned sessions court judge found the appellant-accused ('the accused') guilty of an offence under s 9(2) of the Aviation Offences Act 1984 ('the Act'), punishable under s 14 thereof.

[2] The gravamen of the charge is that on 24 October 1996, at about 9.30am at the Kuching International Airport ('Kuching Airport'), in the state of Sarawak, the accused did unlawfully and intentionally cause to be placed on an aircraft in service, to wit, Transmile Air Flight No TH 731 ('the Transmile flight') leaving Kuching Airport on 24 October 1996 at about 10.50pm, arriving at Kuala Lumpur International Airport ('KLIA') on 25 October 1996 at about 12.10am, a device which is likely so to damage the aircraft as to be likely to endanger its safety in flight.

[3] The accused was convicted and sentenced to 10 years imprisonment.

[4] The accused's appeal to the Kuching High Court was dismissed by the learned judge. The conviction and sentence were affirmed.

[5] The accused has now appealed to this court against the whole of the decision of the High Court.

TRIANGULAR LOVE LINK

[6] The finding of facts unfolded an episode of a seemingly triangular love link.

[7] Sometime in December 1995, Kueh Hui Mei ('Hui Mei'), a young undergraduate studying in New Zealand, returned home to Kuching for her annual holiday.

[8] In mid-December 1995, together with her mother Yin Mei Yee, Hui Mei visited her maternal aunt Yin Mui Kim in Miri. Hui Mei through her cousin Yong Siew Lee ('Siew Lee') met the accused who was Siew Lee's fiance then.

[9] During Hui Mei's holiday in Miri, the accused together with Siew Lee and Siew Lee's brother took Hui Mei for sightseeing and shopping. Hui Mei and her mother returned to Kuching just before Christmas. A

[10] Shortly after Christmas, together with Siew Lee and her brother, the accused drove his car from Miri to Kuching to visit Hui Mei and stayed in Hui Mei's house. Hui Mei reciprocated the hospitality to her visitors. During the visit, the accused spoke to Hui Mei about her studies. B

[11] A few days after Hui Mei's visitors returned to Miri, she received a phone call from the accused at night, asking for her address which she gave in order to enable the accused to send her photographs taken during the visit. C

[12] The accused followed up with a second call to ask if Hui Mei had received the photographs. D

[13] The accused made a third call to her, informing her that he intended to pursue his studies in New Zealand. The accused asked for more information, which she gave, with her mother's permission. The accused sent her the photographs together with his letter stating, inter alia, that she looked lovely. He signed off with his name 'Dominic Chin'. E

[14] The accused made a fourth call to Hui Mei talking about his job and her studies. F

[15] Subsequently, she received a birthday card from the accused in the United States. The accused signed off with the word 'love'.

[16] She then received an overseas Valentine card from the accused who also signed off with the word 'love'. G

[17] Next, she received a letter from the accused who addressed himself as 'love', adding that he was attracted to win her heart. H

[18] In yet another letter, the accused asked her whether she would like to reply to his letters, as he would be glad to hear from her and to win her over in order to replace Siew Lee in his heart. I

[19] The accused's expression of love or infatuation to Hui Mei was done behind Siew Lee's back.

[20] Eventually, Hui Mei stopped taking calls from the accused.

[21] She informed her mother of the accused's letters and cards, and told Siew Lee by letter that the accused had been writing to her (Hui Mei).

[22] From Miri, Siew Lee's mother went to Kuching to collect, from Hui Mei's mother, the accused's letters and cards, which were brought back to Miri. Being furious, Siew Lee decided to break off the engagement with the accused.

[23] Later, Hui Mei returned to New Zealand to continue her studies thereby cutting off all calls from the accused.

[24] On 29 October 1996, Hui Mei received a card from Wellington post office requesting her to collect a parcel there.

[25] She went to the post office with a friend named Ken Kok ('Ken') in the latter's car, a red Honda Accord bearing registration No PD 6235 ('the car'). She collected the parcel and proceeded to the front passenger's seat of the car. Upon opening the parcel, she saw a pink box which contained a black box. While she was trying to unwrap the black box, a bomb in it exploded. She quickly threw the box to the back seat of the car and got out of it.

[26] The explosion burned her, and Ken who was in the driver's seat. Ken immediately drove her in the car to a nearby hospital to seek treatment. He locked the car before they went to see a doctor. He passed his car keys ('the car keys') to a police officer named Douglas Stuart Baber ('Douglas') who in turn handed them to detective sergeant Malcolm MacMillan ('Malcolm') of the Criminal Investigation Bureau, Wellington. Both Douglas and Malcolm affirmed this in their affidavits respectively.

[27] Hui Mei was hospitalised. She suspected the accused was the sender of the parcel, apparently on the basis that the accused hated her for breaking up the engagement between him and Siew Lee.

THE PARCEL

[28] The parcel, consisting of an envelope, a gift wrapper and a piece of particle board (collectively 'the component parts'), was sent from Kuching post office under consignment form PL1 bearing Code No EE 507780993 MY on 24 October 1996. It was placed on the Transmile flight piloted by Omar Bakri bin Ahmad from Kuching Airport departing at 2255 hours and arriving at KLIA at about 0035 hours.

[29] Saiful bin Anuar, a clerk with MAS Cargo, received the parcel in good condition from the Transmile flight and placed it on a MAS trolley for loading on board Qantas Airways flight QF32 bound for Auckland, New Zealand.

[30] Pablo Maria of Qantas Airways loaded the parcel in a container stored in the warehouse overnight and then transported the container to the outbound aircraft on 27 October 1996.

[31] The affidavit of one Kerry John Burgham ('Kerry'), the senior mail processing officer of the New Zealand Post International Mail Centre, Auckland, affirmed, inter alia, that on 27 October 1996, at about 1620 hours, he received the parcel from Kuala Lumpur and sent it to the mail processing section on 28 October 1996.

[32] On 28 October 1996, Diana Edwina Manvel, senior mail officer of the Auckland International Mail Service Centre, received the parcel in good condition. After scanning and affixing the New Zealand bar code, she passed the parcel to a customs officer for inspection in her presence. Having done that, the customs officer returned the parcel to her without opening it. She scanned it before placing it for onward dispatch to the Wellington post office.

[33] Kay Margaret Black, the site administration manager of Courier Post, Huttrode, Wellington, received the parcel in good condition. Two attempts were made by the staff, named Josanna and Sandy, to deliver the parcel to Hui Mei but were unsuccessful.

[34] Malcolm also affirmed in his affidavit that at about 1.05pm of 30 October 1996, as a result of information received, he arrived at the Wellington Public Hospital car park where he found the car was locked. On the back seat, he saw a box with some sort of device in it. He immediately isolated the car until the arrival of the two-member bomb disposal team ('the team'). He received the car keys from Douglas who confirmed the same in his affidavit. Malcolm briefed the team and handed them the car keys.

[35] The team opened the car, and used something to plod inside the car. After the team had declared the area safe, the car keys were handed to detective sergeant Russell Joseph ('Russell') of the Criminal Investigation Branch Wellington to conduct further examination.

[36] Russell testified that on 30 October 1996 at 12.30pm, he went to the car park and had a discussion with the team. He made an exterior and interior examination of the car. In the interior examination, he removed from the back seat an improvised explosive device ('IED'), inter alia, which he

A transported to his office and kept them under lock and key. The IED is made of a musical box. He could not locate a similar one in New Zealand.

[37] On 1 November 1996, Russell handed the IED to detective constable Michael John Sears ('Michael') who acknowledged receipt thereof, as affirmed in his affidavit. Michael further affirmed that on the same day, he delivered the IED to Mrs Shelley Radaich ('Shelley') a fingerprint expert attached to the Fingerprint Section of the Wellington Central Police Station for fingerprint examination. On 14 November 1996, he secured these exhibits from Shelly and handed them to Mr Peter Douglas Wilson ('Peter') for scientific examination. Peter confirmed receiving them on 15 November 1996.

[38] On 16 November 1996, Peter delivered the IED to senior detective sergeant Ronald Chatt who in turn passed it to ASP Ahmad Nordin of the Royal Malaysian Police on 18 November 1996.

[39] In New Zealand, fingerprints were lifted from the component parts. Fingerprints were also lifted from the Immigration Arrival Card and Immigration Departure Card (collectively 'the immigration cards') that bore the name of the accused as the person who had used them as security cards to enter and leave New Zealand, on 9 February 1996 and 17 February 1996 respectively.

[40] Two New Zealand fingerprint experts, viz Inspector Andrew Veno ('Andrew') and Shelly, testified that the fingerprints found on the component parts are similar to those found on the immigration cards and they belong to the same person.

[41] In order to establish that those fingerprints belong to the accused, the accused's fingerprints and the photographs thereof were sent from Malaysia to New Zealand, for examination and comparison by Shelly. Shelly found them to be similar to the fingerprints lifted from the component parts and Immigration Cards.

[42] Andrew also compared another set of the accused's fingerprints taken in Malaysia with those lifted from the component parts. He was of the opinion that the fingerprints were similar.

[43] In Malaysia, Norsiah Mat Yusof, a chemistry department examiner, examined and compared the handwriting found on one of the envelopes with those of the various letters which Hui Mei had received from the accused. The document examiner was of the view that the same person, the accused, had penned the letters and the envelope.

[44] At the close of the prosecution's case, the sessions court had embarked upon a maximum evaluation of the evidence, indeed with a microscope, before calling upon the accused to enter his defence. The sessions court has applied the correct standard of proof ie beyond reasonable doubt, prevailing then. The High Court subscribed to the same sentiment.

[45] In my view, there is ample unchallenged evidence of an unbroken link in the handling of the parcel from the time it was received as a mail parcel in Kuching to the time of its explosion in the hand's of Hui Mei in Wellington. The defence was correctly called.

DEFENCE CASE

[46] The accused testified, inter alia, that:

(1) As a mechanical engineer and submarine pilot, he was not able to concoct a device stated in the charge;

(2) On 24 October 1996, he was together with his parents in Buntal, which is half an hour's journey by car from Kuching, to look at a farm house. He returned to Kuching only in the evening. He was not in Kuching early in the day, and did not go to Kuching post office to send the parcel;

(3) There was no romantic involvement between him and Hui Mei, but he had authored and sent letters and cards to Hui Mei, for the purpose of testing the genuineness of Siew Lee's love for him; and;

(4) He did not meet Hui Mei in New Zealand when he went there in February 1996.

[47] The sessions court had considered the defence case in the light of the prosecution' case and concluded that:

(1) The accused had decided to send Hui Mei the parcel to teach her a lesson; and;

(2) The circumstantial evidence adduced by the prosecution is capable of only one conclusion ie the accused was the person who had sent the device in the parcel to Hui Mei and had caused it to be placed on the Transmile flight at the time and date specified in the charge.

[48] At the close of the defence case, the sessions court found that the prosecution has proved the charge against the accused beyond reasonable doubt. The accused was convicted.

[49] The High Court had affirmed the conviction.

ADMISSIBILITY OF AFFIDAVITS

[50] The defence submission did not raise any issue pertaining to the concurrent finding of facts by both the courts below. There is only one contention. It relates to the admissibility of affidavits.

[51] It was submitted by learned defence counsel Mr Karpal Singh (assisted by Mr Anthony Bong) that:

(1) the novel and unprecedented issue of considerable importance is that the accused had discharged the burden of proving that Parliament, in enacting s 6, had been under the misconception that at the close of the prosecution's case, the prima facie standard of proof was required, when actually the standard of proof was one beyond reasonable doubt ('the common law principle'); and

(2) the affidavits adduced for the prosecution are inadmissible, and so there is a break in the chain of evidence.

[52] They cited:

(a) *Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49 (PC);

(b) *A Ragunathan v Pendakwa Raya* [1982] 1 MLJ 139 (FC);

(c) *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265 (SC);

(d) *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 (FC);

(e) *Bahruni bin Ismail v Pendakwa Raya* [1997] 2 MLJ 265 (FC); and

(f) *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 (FC).

(collectively 'the standard of proof authorities').

[53] Learned deputy public prosecutor Mr Manoj Kurup gave the short answer that for the purposes of this appeal, there is nothing in the defence submission.

[54] In dealing with this issue, the sessions court concluded, inter alia, that it is safe to rely on the affidavits properly admitted under s 6 and to attach weight to them.

[55] On appeal, the High Court held, inter alia, that: A

(1) By s 6, depositions in the form of affidavits are to be admitted as evidence to which the court must have regard;

(2) There is a presumption against any mistake in an Act of Parliament: *Bindra's Interpretation of Statutes* (8th Ed) p 193; B

(3) Parliament is only concerned with procuring the evidence of overseas witnesses, irrespective of the then prevailing standard of proof, and affidavits are to take the place of the deponent's oral evidence in court without any cross-examination; C

(4) Every statement in the affidavits has to be evaluated and weighed against the other evidence adduced for the prosecution to determine its truth or otherwise;

(5) The standard of proof authorities, including *Arulpragasan* must be read subject to the requirements of s 6, and for that matter, any other written law; D

(6) Since s 6 allows affidavits to be accepted, it necessarily means that in respect of an offence under the Act, the standard of proof has been fulfilled when these affidavits have undergone maximum evaluation; E and

(7) Although bereft of the opportunity of cross-examination, at the prosecution stage of the case, the defence is at liberty to challenge or test the affidavits on grounds of incredibility by reference to the affidavits inter se or other evidence adduced for the prosecution. F

[56] The relevant portions of s 6(1) viz (a) and (b) and (5)(a) and (b) merit reproduction as follows:

G

6 Provisions as to evidence in connection with aircraft

(1) Where in any proceeding before a court in Malaysia for an offence committed on board an aircraft the testimony of any person is required and the court is satisfied that the person in question cannot be found in Malaysia, there shall be admissible in evidence before that H court any deposition relating to the subject matter of that proceeding previously made on oath by that person —

(a) in Malaysia which was so made in the presence or absence of the person charged with the offence and before a President of a Sessions Court or Magistrate; or I

(b) outside Malaysia which was so made in the presence or absence of the person charged with the offence and before a consular officer or a judicial officer of any foreign country.

A (2) …

(3) …

(4) …

B (5) In this section —

(a) the expression 'deposition' includes any affidavit, ...;

(b) the expression 'oath' includes an affirmation or declaration in the case of persons allowed by law to affirm or declare instead of
C swearing; and

...

D **[57]** The impugned depositions are six affidavits in exh P54 to P59 ('the affidavits'). For ease of reference, they are tabulated as follows:

Deponent/s	Affirmed before
(1) Kerry	New Zealand district court judge LH Moore, under s 6(1)(b) second limb
E (2) Ken	) Tan Eng Bing, Second Secretary of the Malaysian High Commission in New Zealand, under s 6(1)(b) first limb
(3) Hannah Maria Collins	)
(4) Malcolm	)
F (5) Michael, and	)
(6) Douglas	)

[58] The affidavits were produced in court through Detective Inspector
G Brett Anthony Kane who managed and supervised the criminal investigation of serious crimes in Wellington City. He testified that the six deponents were at the material time residing in New Zealand and hence could not be found in Malaysia.

H **[59]** I am of the view that s 6(1)(b) specifically reflects the intention of Parliament to dispense with the attendance of the relevant witnesses for cross-examination. It is designed to cover the category of witnesses who cannot be found in Malaysia. Its avowed purpose is to avoid the expense and inconvenience of procuring their presence to testify in person, or to obviate
I the obstacle of compelling their presence when they are unwilling to present themselves as witnesses on ground of extra territorial jurisdiction. It empowers the court hearing the charge against the accused to receive the affidavits as admissible evidence, so long as the affidavits have fulfilled the requirements therein. In the instant appeal, s 6(1)(b) applies as the affidavits

were affirmed before a judicial officer of New Zealand pursuant to the second limb thereof, or our consulate officer pursuant to the first limb. There is no dispute that these statutory requirements have been fulfilled. A

[60] In its wisdom, Parliament in exercise of its legislative powers, is entitled to enact any written law, provided that it is neither inconsistent with nor repugnant to the supreme law enshrined in the Federal Constitution. It is within the legislative competence of Parliament to enact any written law to replace, displace or even overrule any common law rule. This has been illustrated in limitless statutory presumptions which have the effect of reversing the burden of proof in criminal cases. B C

[61] As a general rule, in all criminal cases, the time honoured common law golden rule is to cast the burden of proof on the prosecution throughout the entire proceedings to establish the guilt of the accused. However, Acts of Parliament creating criminal offences in customs cases, dangerous drugs cases and corruption and bribery cases have enacted statutory presumptions under s 119 of the Customs Act 1967, s 37 of the Dangerous Drugs Act 1952 and s 42 of the Anti Corruption Act 1997, respectively. These statutory presumptions would arise when the prosecution has established the essential fundamental facts. The burden of proof is then shifted to the defence to prove the contrary on a balance of probabilities. In doing so, Parliament cannot be said to have enacted the statutory presumptions under a misconception of the existing common law. D E

[62] Similarly, in the instant appeal, Parliament is competent to enact s 6(1) requiring the admissibility of affidavits in the absence of any cross-examination, provided that the prosecution has fulfilled the statutory requirements contained therein. There can be no question of Parliament being under a misconception relating to the common law standard of proof. The legislative competence of Parliament means that Parliament, through the provisions of s 6(1), is entitled to replace etc the common law standard of proof. The common law principle is certainly subject to s 6(1). F G

[63] In this regard, the above standard of proof authorities are not of any assistance to the defence case. H

[64] I am of the view that the High Court has correctly interpreted and applied s 6(1) and has occasioned no error in affirming the decision of the sessions court. I

[65] I therefore hold that the defence submission is devoid of merits. The appeal against conviction is dismissed.

SENTENCE

[66] Section 14 of the Act provides that any person who commits an offence under the Act shall on conviction be liable to imprisonment for life.

[67] The long title to the Act says that the Act is to give effect to the following conventions which have been signed and ratified by Malaysia:

(1) the Convention on Offences and Certain other Acts Committed on Board Aircraft, in Tokyo on 14 September 1963 ('Convention (1)');

(2) the Convention for the Suppression of Unlawful Seizure of Aircraft, in The Haque on 16 December 1970 ('Convention (2)'); and;

(3) the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation in Montreal on 23 September 1971 ('Convention (3)').

[68] The relevant scope of Convention (1) merits reproduction as follows:

CHAPTER 1

SCOPE OF THE CONVENTION

Article 1

(1) This Convention shall apply in respect of:

(a) offences against penal law;

(b) acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardise good order and discipline on board.

[69] Convention (2) was signed and ratified after considering that:

(a) unlawful acts of seizure or exercise of control of aircraft in flight jeopardise the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;

(b) the occurrence of such acts is a matter of grave concern; and

(c) for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders.

[70] Convention (3) takes into consideration:

(a) unlawful acts against the safety of civil aviation jeopardise the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation;

(b) the occurrence of such acts is a matter of grave concern; and

(c) for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders.

[71] The seriousness and gravity of the offence committed by the accused cannot be disregarded. One has only to imagine the consequences that would ensue if the parcel had been unwrapped and had exploded en route and in-flight from Kuching to Kuala Lumpur and eventually to Wellington.

[72] Parliament has provided for the maximum sentence of life imprisonment, the ceiling of which in this context is 20 years. A sentence of 10 years imprisonment imposed by the sessions court and affirmed by the High Court can hardly be construed as manifestly excessive. It is also not an erroneous exercise of discretion. It is commensurate with the seriousness and gravity of the offence in question. Our courts have the duty to send out the right message to show public disapproval and abhorrence.

[73] The process of sentencing involves an exercise of judicial discretion by the trial judge, having regard to the facts and circumstances prevailing in each particular case. In the absence of any unauthorised, extraneous or irrelevant exercise of discretion by both the courts below, this court should be slow and indeed should refrain from disturbing it (see eg *Bhandulananda Jayatilake v Public Prosecutor* [1982] MLJ 83, p 84 (FC); *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697, pp 710–711; and *Loh Liang Gun & Anor v Public Prosecutor* [2007] 5 MLJ 159 (CA)).

[74] I am unable to find any merit in the appeal against sentence. The sentence should be and is hereby affirmed.

[75] My learned sister, Zainun Ali JCA and my learned brother, Hasan Lah JCA have read this judgment in draft and have expressed their agreement with it to become the judgment of the court.

Appeal dismissed.

Reported by Andrew Christopher Simon